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# Economics, Law & Institutions: The Shaping of Chinese Competition Law

David J. Gerber<sup>\*</sup>

## ABSTRACT

*China has been considering enactment of an anti-monopoly (antitrust) law since 1993, and it has now enacted such a law. Given the potential importance of this legislation, there is much uncertainty about what the enactment means and what roles it is likely to play in influencing the development of the Chinese economy. This article applies a neo-institutionalist analysis in examining some of the factors that have influenced the shaping of the legislation and that are likely to influence the operation of competition law and its organizations. The main argument is that the central dynamic in both the creation of the statute and its structuring has been the interaction of Chinese economic policy institutions with foreign pressures (institutional mechanisms intended to “push” the Chinese decision makers in certain directions) and foreign cognitive influence (cognitive factors that accord influence to foreign organizations, experience, and laws). These interactions also provide insights into how the law is likely to be applied. The paper also explores these two concepts—foreign pressure and foreign cognitive influence—in relation to the theory of institutional change.*

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\* Distinguished Professor of Law, Chicago-Kent College of Law. This Article is based on a presentation at the annual meeting of the International Society for the New Institutional Economics, Boulder, Colorado, September 2006. An earlier version was presented at a conference of the East Asian Law Center at Harvard Law School in May 2006. I would like to thank participants at both conferences for their valuable comments on the presentation.

China has been considering enactment of a competition law since 1993, and in August of 2007 it finally enacted such a law.<sup>1</sup> Enactment and enforcement can be expected to impact the Chinese economy, perhaps in significant ways. As a result, there is considerable interest and concern in many countries, especially the United States, about what to expect from the new law.<sup>2</sup> In particular, there is speculation about how such a law is likely to be interpreted and enforced. Questions such as “Will it be enforced seriously?”, “Who will enforce it?”, and “Will it be enforced primarily (and perhaps discriminatorily) to the conduct of foreign firms?” are commonly heard.

There has, however, been little systematic study of how these questions might be answered or even of how useful insights into these developments might be generated. The internal workings of legal and political decision processes in China are far from transparent, especially for those viewing the situation from outside China. As a result, there is often little information available for use in assessing the dynamics of those processes. In this Article, I offer some analytical tools that can provide insight into the evolution of competition law in China and thereby into the factors that are likely to influence its operations in the future. These tools have potentially far broader application. I expect them to prove valuable for analyzing any situation in which a national or local law is or may be influenced by legal developments or factors beyond its borders, especially in the context of economic globalization, but I leave that topic for future exploration.

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1. Zhong Hua Ren Min Gong He Guo Fan Long Duan Fa, at [http://www.5dka.cn/flfg/2007-08/30/content\\_732591.htm](http://www.5dka.cn/flfg/2007-08/30/content_732591.htm). For an English translation, see Nathan Bush, *The PRC Anti-Monopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCES, Oct. 2007, available at <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>. For detailed discussion of the development of the legislation, see H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHICAGO J. INT'L L. 169, 174–83 (2006).

2. An indication of this interest is the American Bar Association's submission of a detailed set of comments on the proposed anti-monopoly law to the Chinese. See JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA (2003), <http://www.abanet.org/antitrust/at-comments/2003/07-03/jointsubmission.pdf>.

My basic claim here is that in seeking to comprehend the development of competition law in China, there is much value in an analysis that identifies the following three sets of factors and that accounts for their interaction. These three sets of factors have interacted to influence the development of the Chinese competition legislation thus far, and are likely to influence its implementation going forward. Each set operates on domestic decision makers; the relative force of the sets and their inter-relationships shape the decisional landscape that the decision makers inhabit. First is the domestic incentive structure—i.e., the set of incentives derived from and created by domestic institutions, particularly, the need for political support. The second set of factors is “cognitive” or “epistemic.” It refers to the knowledge base in foreign law and general experience that is available to Chinese decision makers in this area. Competition law is new to China, and thus foreign influence has been particularly instrumental in creating legislation and shaping thought about issues relating to it. The third set of factors includes foreign institutional pressure. Chinese decision makers must respond not only to domestic-source incentives, but also to incentives from the external political, legal and institutional contexts within which they must act.

The analysis I use here provides explanatory and predictive force by identifying such factors, tracing their roles in the creation and shaping of the legislation, and showing how they can be expected to influence its implementation. This analysis applies and further develops tools that I have sketched in previous work,<sup>3</sup> and also draws on analytical insights from scholars in the area of new institutional economics in the sense that it focuses on analyzing the interests and incentives of individuals and institutions.<sup>4</sup> It uses these tools,

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3. See, e.g., David J. Gerber, System Dynamics: Toward a Language of Comparative Law, 46 AM. J. COMP. L. 719, 726–33 (1998).

4. For recent leading work in this field, see, e.g., THE FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS (John N. Drobak & John V. C. Nye eds., 1997). The foundational work of Douglass North has been of particular value in this context. See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (1981).

however, in ways that have not, to my knowledge, been systematically explored.<sup>5</sup>

This brief Article first sketches these sets of analytical tools. It then applies them to the development of competition legislation in China, probing the factors that have been at work there. It looks at the impetus for competition law, then the process of shaping the legislation, and, finally, the factors that are likely to influence the operation of the system created to implement the legislation.

## I. ELEMENTS OF THE ANALYSIS

### A. Competition Law: Identity and Basic Roles

“Competition law” here refers to a legal regime in which the stated objective is to prevent restraints on the competitive process by economic actors.<sup>6</sup> Such a regime typically contains norms that are intended to deter economic actors from engaging in conduct that reduces the effectiveness of market processes.<sup>7</sup> It may, for example, prohibit cartels—i.e. agreements among competitors to reduce competition between themselves—and contracts in which a manufacturer or distributor controls the conduct of actors further down the distribution chain in ways that harm competition. Merger controls are also common in competition law systems, as are controls on certain forms of unilateral conduct by dominant firms. This form of law plays a unique role in the sense that it creates and enforces

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5. Bruce Carruthers and Terry Halliday have done valuable work in related fields that contribute to understanding the relationships between domestic legislation and globalization processes. See Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm-Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007); Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Systems*, 31 LAW & SOC. INQUIRY 521 (2006). The theme is also developed in PITTMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* (2001).

6. In the United States, this type of legal regime is referred to as “antitrust law”, but in much of the world, including China, the preferred term is “competition law.” In some contexts the latter term is used more broadly to cover both “antitrust law” and “unfair competition law.”

7. For comparative discussion of competition law, see David J. Gerber, *Comparative Antitrust Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1193 (Mathias Reimann & Reinhard Zimmermann eds., 2006) and David J. Gerber, *Competition Law*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 510 (Peter Cane & Mark Tushnet eds., 2003).

public norms that interfere with the “free” competitive process in order to deter or prevent private interferences with that process.

When implemented, competition law can shape both the market and the state. It not only shapes the incentive structure of business firms, but it also gives public officials particular forms of authority for influencing markets, which can influence relationships both among public agents and between public institutions and private actors. Moreover, competition law has a potentially powerful symbolic-expressive function. It represents symbolically the relationship between economic and political processes, articulating the political system’s normative claims about the proper relationship between the market, society and the political system.

Competition law often has a transnational dimension, even when it does not intend specifically to influence transnational conduct. Such a regime may have direct influence, for example, where a state applies its competition law to conduct outside its territory and thus directly affects the incentives of firms that fall within its jurisdictional orbit. In addition, however, it may have indirect effects. Markets are economic institutions, and as such they are in themselves not limited by political boundaries. The incentive to sell extends to wherever there are potential buyers, and the incentive to purchase extends to wherever there are potential sellers. A state may use its control of its own borders to create artificial, political boundaries for markets, but without government intervention market incentives are not coterminous with political borders. As a consequence, where a competition law regime alters market incentives and the conditions of operation in one part of a transnational market, it indirectly influences all participants in the market. For example, it may alter investment incentives within its territory, thereby influencing the flow of capital to other markets and areas. It may also deter certain forms of conduct within its sphere of application (or “jurisdiction”) thereby changing incentives to engage in such conduct outside its territory.

### *B. Decisional Factors*

In order to generate insights into the development and operations of a competition law regime, it is necessary to use analytical tools

designed specifically for that purpose and capable of identifying all potentially relevant factors. Therefore, I use decisions as the focal point of the analysis and ask what kinds of factors influence decisions relating to competition law. I use the term “decision” broadly, referring to all acts that are related to the creation, promulgation or implementation of competition law norms. This focus on decisions provides a method of identifying influences from all potentially relevant sources. It also enables the analyst to relate those influences to each other at the precise point in which they exercise influence.<sup>8</sup> In the context of Chinese competition law, the potential transnational importance of the decisions that Chinese officials make regarding competition law has led to intense international pressure and scrutiny, and this requires (1) that the analysis register both foreign and domestic elements and (2) that it have the capacity to relate the decisional influences to each other. The relationship among influences is the critical factor.

### 1. Domestic Incentive Structure

The domestic incentive structure is necessarily central to this analysis. Legislative and administrative decision makers depend on the support of domestic institutions and the related interest groups and constituencies for political support (as well as their jobs and incomes). Typically, these institutions and constituencies represent the primary influence on such decisions.<sup>9</sup> All other sources of influence are likely to depend on how they relate to domestic institutions and incentives for their effect. For example, if a foreign influence is perceived by Chinese decision makers as associated with particular domestic incentives and interests, this association is likely to affect its influence on those decision makers.

In the context of competition law decisions, three decisional influences are particularly prominent. One includes the internal political (or “domestic-power-related”) incentives of those who make

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8. For discussion, see Gerber, *supra* note 3, at 728–33.

9. Under some circumstances, non-domestic institutions move to center stage, as in the case of the Asian financial crisis of 1997, when countries such as Indonesia had little choice but to heed the requests of foreign lending institutions that they change their laws in specific ways.

such decisions. Each official involved has incentives to preserve or increase her own power and authority as well as the power and authority of the institutions with which she is associated. This power may translate into personal benefits such as higher personal compensation as well as institutional benefits such as higher budgets for the institution with which the decision maker is associated.

Competition law in China involves particularly complex and multi-faceted incentive structures because of the role of the state in the economy.<sup>10</sup> The central government is itself an important player in the economic picture. Not only are many large companies still owned by the state, but government bodies also influence many forms of economic conduct through mechanisms such as regulatory regimes, licensing, controls on credit, and various other requirements for governmental approval. Managers of state enterprises thus have incentives to protect the conduct range and profits of their business operations as well as the personal and institutional benefits that derive from their roles as intermediaries between the state and the markets in which they operate.

Ideologies are a second component of this incentive structure. Where a government or other institution announces that it is pursuing specified ideological goals (such as social equality) or that it is motivated by particular ideological considerations, this creates incentives to take actions that are likely to be interpreted as consistent with these ideological claims. The impact of such incentives varies greatly, depending on factors such as the power of the institution, the degree to which discrepancies between ideological goals and actual implementation are perceived as harmful to groups within the society, and the capacity of such groups to exert political pressure on the institution to reduce the discrepancy. Given that an institution can change its articulated ideological commitments, it can mitigate the effect of such incentives, but it can seldom do so without political cost.

China's political leadership has ideological commitments that relate to competition law,<sup>11</sup> and they represent a potentially important

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10. For discussion, see, *e.g.*, STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 102–37 (1999).

11. See Joint statement of the 10th China-EU Summit, Beijing, Nov. 28, 2007, *available*



part of the incentive structure facing decision makers involved with competition law. In particular, government rhetoric emphasizes the need to achieve fairness within the economic system.<sup>12</sup> This might, for example, justify considering firm size in enforcing competition law, either by applying the law more strictly to larger firms or providing exceptions or other advantages for smaller firms. Another example is the government's growing ideological commitment to the "rule of law."<sup>13</sup> Although what the government means by that term is not always clear, the basic idea tends to support enactment and enforcement of competition law, because such a move at least appears to diminish the discretion of central government officials. It signals that state intervention in the economy is subject to legal processes rather than merely being controlled by political predilections and personal gain.

A third set of incentives comes from economic processes themselves. Institutions require financial resources, and thus they have incentives to take decisions that will tend to increase available funds. Although this may include strategies for seeking transfer payments (*e.g.*, foreign aid or government loans) it also often includes strategies for increasing the effectiveness of domestic markets. These economic forces are not subject to government control. They have their own logic and create their own imperatives.

Chinese governments on all levels (national, provincial and local) have come to recognize over the last twenty years that whatever their political objectives might be, they need to develop markets in order to achieve many of them.<sup>14</sup> Although the degree of emphasis on market forces varies among Chinese government institutions and over time within the same institutions, market imperatives are now recognized as of major importance.<sup>15</sup> In China, much of the emphasis over the

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at <http://www.fmprc.gov.cn/eng/wjdt/2649/t386520.htm>.

12. See, *e.g.*, DALI YANG, REMAKING THE CHINESE LEVIATHAN: MARKET TRANSITION AND THE POLITICS OF GOVERNANCE IN CHINA 65–109 (2004).

13. For discussion, see RANDALL A. PEERENBOM, CHINA'S LONG MARCH TOWARD THE RULE OF LAW (2002) and Albert H.Y. Chen, *Discussion in Contemporary China on the Rule of Law*, in THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 13 (2000).

14. See Yang, *supra* note 12, at 25–64.

15. Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 225 (2005).

last two decades has been on attracting foreign capital as a means of achieving economic development. This has been highly successful, and it remains a focus of government efforts. The strategies needed to keep investment flowing into the country are, however, themselves contestable and changing. In addition, there is growing awareness that more attention needs to be paid to increasing the efficiency of indigenous Chinese economic processes, for example, by encouraging domestic entrepreneurs and by reducing government interference with market competition.<sup>16</sup>

The impact of market incentives depends on perceptions. In particular, it depends on the perceived effectiveness of foreign and domestic policies aimed at the development of markets as well as on perceptions of the applicability of foreign experience to domestic policy choices. Not least, it depends on the confidence of decision makers in available forms of economic theory and in particular sources of expertise.

## 2. Foreign Cognitive Influences

A second set of decisional influences acting on competition law relates to the knowledge base for decisions—what I call “cognitive influences.” Here I use the term “cognitive” (or “epistemic”) to refer to all aspects of “knowing”—such as what data is available, how it is interpreted, how interpretations relate to each other, and how knowledge is located in and transferred within institutions. In short, what kinds of information do the decision makers have and how do they structure and interpret it.

Of particular concern here is knowledge about foreign competition law and experience. The relative intellectual isolation of Chinese scholars and leaders before 1990 and continuing linguistic and practical limits on access to foreign legal materials combine to give this issue poignancy for the analysis of competition law development. The extent to which such knowledge influences specific decisions depends on factors such as the status of the information, the political and cultural values applied in interpreting

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16. See, e.g., SHAHID YUSUF, KAORU NABESHIMA & DWIGHT H. PERKINS, UNDER NEW OWNERSHIP: PRIVATIZING CHINA’S STATE-OWNED ENTERPRISES 1–40, 77–113 (2006).

and assessing it, and the concepts and categories that shape its cognition.<sup>17</sup>

### 3. Foreign Institutional Pressure

Finally, a distinct set of decisional factors includes foreign institutional pressure. It is important to distinguish institutional pressure from the just-mentioned category of cognitive influences. The two are commonly not distinguished, but failure to see them as separate and distinct can undermine effective analysis and assessment.

I use the term “institutional pressure” to refer to situations in which one institution explicitly or implicitly sets performance criteria for the conduct of another institution and signals that it will reward fulfillment of these criteria and possibly punish the failure to achieve them. The extent of such pressure depends on factors such as, for example, the clarity and precision of the performance criteria, the means used in evaluating compliance, the probability that sanctions will actually be imposed or rewards provided, and the potential impact of such sanctions and rewards.

The issue of competition law in China has elicited pressure from numerous foreign organizations. In general, such pressure has been understated and, frequently, indirect. Chinese officials have shown little willingness to respond favorably to overt and direct pressure with regard to their domestic legislation, and thus efforts to apply pressure have typically been non-confrontational, and the suggestion of rewards and sanctions has often been implied or concealed from public view.

These three sets of decisional influences relate to each other in many ways. For purposes of the analysis here, however, the essential point is that they interact in influencing decisions, specifically, the decisions of relevant Chinese officials and scholars. An analytical focus on the concept of “decisions” thus provides tools for effective analysis of the dynamics of competition law in China.

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17. For discussion of factors that shape the development of competition law, particularly in its early stages, see DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 10–15 (1998).

## II. THE IMPETUS FOR CHINESE COMPETITION LAW

I now apply this analysis to Chinese competition law, looking first at the incentives for China to enact a competition law.<sup>18</sup> Foreign pressure and foreign cognitive influence have provided an impetus for the enactment of competition law, but there are also domestic incentives that push in the same direction.

Foreign institutional pressure has played a significant role in inducing Chinese officials to enact a competition law.<sup>19</sup> In particular, international institutions have encouraged China to take this step. One major factor has been China's entry into the World Trade Organization (WTO).<sup>20</sup> Although WTO membership does not specifically create an obligation on members to enact a competition law, it does create general obligations for members to avoid distortions to market competition,<sup>21</sup> and competition law can serve as a proxy for a country's willingness to take seriously that obligation. In that capacity it signals the government's willingness to allow its economy to operate on market principles. For Chinese officials, enacting such a law represents a way of signaling its desire to expand its role in the international system, and such signals can be of value in gaining acceptance and support for such expansion.

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18. For discussion of incentive issues in the context of Chinese competition law, see Bruce M. Owen, Su Sun, Wentong Zheng, *Antitrust in China: The Problem of Incentive Compatibility*, J. COMPETITION L. & ECON. 123 (2005).

19. The Chinese competition law has developed under conditions that differ dramatically from those under which competition law developed in the United States and Europe. In those western contexts, domestic decision makers looked basically to their own needs and political incentives in developing the law. In China, by contrast, the potential importance of the law has drawn enormous interest and much pressure from outside the country, and this has required Chinese decision makers to at least pay careful attention to these outside factors, if not to be influenced by them.

20. For discussion of the impact of WTO accession on China's legal system, see Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97 (2003).

21. United States—Section 337 of the Tariff Act of 1930, Panel Report adopted on Nov. 7, 1989, B.I.S.D.36S/386, para. 5.11; Canada—Administration of the Foreign Investment Review Act, Panel Report adopted 7 February 1984, B.I.S.D. 30S/140, 159-161, paras. 5.7-5.11; Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies,” DS17/R, Panel Report adopted on 18 February 1992, B.I.S.D. 39S/27, 75-76, para. 5.5

Foreign cognitive influence also tends to support the enactment of such a law. Chinese leaders are aware that most developed countries have competition laws and that there is a widespread belief that these laws contribute to economic development. They also know that a competition law is now generally considered to be an all but necessary part of the legal framework supporting such an economy. It follows that if China wishes to have a fully-developed market economy, it should also have such a law.

Domestic incentives to enact a competition law have not been strong, and there has been opposition to the idea within the government, but on balance they seem to have provided support for competition law. General political agendas have played a significant role in shaping these incentives. One factor has been the claim that such a law will benefit consumers.<sup>22</sup> The government has in recent years paid increasing attention to consumer issues, and enactment of a competition law has the attraction of promising protection to consumers and thereby acknowledging their importance. Competition law also has the advantage of doing this without creating specific short-term expectations among consumers that the government might not be able to meet.

A second strand of support comes from the potential benefits that such a law can yield for the economy. Ideally, it can improve the competitive process and thereby increase economic efficiency. Businesses and government officials at all levels recognize the need to improve the efficiency of the Chinese economy, and thus the potential for competition law to lead to those improvements provides an incentive for support from within the private sectors as well as the bureaucracy. This claim also relates to the potential for increased efficiency to improve the distribution of wealth in China. President Hu Jintao has repeatedly emphasized the government's support for "spreading wealth" within Chinese society,<sup>23</sup> and enactment of a competition law can be adduced as proof that the government is

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22. See generally Wang Xiaoye, *The Prospect of Antimonopoly Legislation in China*, 1 WASH. U. GLOBAL STUD. L. REV. 201 (2002).

23. See Full text of Hu Jintao's report at the 17th National Congress, Part VIII. Accelerating Social Development with the Focus on Improving People's Livelihood, available at <http://english.people.com.cn>, Oct. 15, 2007.

acting on that promise, because improving the competitive process may lead to greater opportunities for individuals and enterprises throughout the country and the society.<sup>24</sup> This is another important area in which the government has curried support from the populace in general as well as from business interests. The strength of this incentive depends in part on the government's rhetoric and its intentions regarding the spread of wealth within Chinese society.

Finally, competition law is often associated with rule of law issues. A competition law signals that the government intends to support the centrality of the market as a means of allocating resources within the society and that, therefore, the economy is governed by laws rather than by the government bureaucracy. This tends to blunt concerns about official bribery and other improper governmental influences on the economy.

Nevertheless, there has also been significant domestic opposition to enactment of a competition law. In particular, State Owned Enterprises (SOEs) have been a major factor in delaying enactment of such a law.<sup>25</sup> For them, competition law represents a threat, because it can interfere with their managerial discretion and the means by which they seek to maintain the market power that they have achieved through their connections with government officials. For example, it may restrict the kinds of agreements that such a firm may use to deter new entrants into markets in which it has acquired monopoly status on the basis of government support, but in which the government has begun to withdraw such support. The strength of SOE resistance may be reduced, however, by their recognition that mere enactment of a competition law does not necessarily create problems for them. Its impact on them will depend on the extent to which it is enforced against them, and they may have grounds for believing that their ties to political decision makers will afford them special privileges in the context of enforcement.<sup>26</sup>

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24. For discussion of concern with such imbalances, see, e.g., Joseph Kahn, *China Worries About Economic Surge That Skips the Poor*, N.Y. TIMES, Mar. 4, 2005, at A10.

25. See, e.g., Lillian Yang, *Anti-Monopoly Law for Review*, S. CHINA MORNING POST, Nov. 7, 2006, Westlaw 2006 WLNR 19250668 and Owen, *supra* note 18, at 130–31. For discussion of the need to focus on State Owned Enterprises (SOEs) in the implementation of the anti-monopoly act, see Wang *supra* note 22.

26. For analysis of the role of SOEs in the Chinese economy, see BARRY NAUGHTON,

### III. SHAPING THE STATUTE

The process of deciding on the contents of a Chinese competition statute has encountered some of the same influences, in sometimes modified form, as well as new decisional influences. Here there are more issues, and they are more complicated. It is not just “yes or no”—competition law or not. Decision makers have to make many choices among many alternatives. My objective here is not to analyze these influences with reference to specific provisions, but rather to identify patterns of influence. Such analysis reveals sets of factors that have not been picked up by other analytical lenses.

Given that the Chinese have no experience with a general competition law,<sup>27</sup> they have had little choice but to refer to foreign experience and to look at foreign models in the drafting process. In order to acquire relevant information, the government has itself sought out information and opinions from foreign sources, especially since about 2000. The government and the Chinese Academy of Social Science have, for example, brought foreign experts to China for conferences and discussions on several occasions, and officials and scholars have made several study trips to the United States and Europe for this purpose. Foreign governments and international organizations have also sought out discussions with the relevant Chinese officials. Officials from the United States, Europe, Germany, Japan, Australia, and Korea have traveled to Beijing to discuss competition law issues and perhaps to seek to influence the contents of the law.

This process has intertwined influences from each of the categories identified here, but foreign cognitive influences and foreign institutional pressures have been particularly important. Nevertheless, Chinese officials have not viewed the shaping of the statute as a process of pure “borrowing.” They have emphasized the

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THE CHINESE ECONOMY: TRANSITIONS AND GROWTH 295–329 (2007), and Yang, *supra* note 12, at 65–109 (2004).

27. There are, of course, specific provisions in some Chinese legislation that have competition law related objectives. For a current review of these items, see CHAO JIN & WEI LUO, *COMPETITION LAW IN CHINA* (2002) and Maher M. Dabbah, *The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?*, 30 *WORLD COMP. L. REV.* 341, 345–47 (2007).

need to create a competition law that is specifically adapted to the Chinese political and economic context.<sup>28</sup>

### *A. Foreign Cognitive Influence*

The lack of prior Chinese experience with competition law has given cognitive influence a particularly prominent role. The Chinese have seriously sought to understand foreign experience and to use it in the creation of their own competition law. This influence has numerous components.

#### 1. The Knowledge Base and Access to Information

One factor is the knowledge base to which the drafters have had access during the drafting process. Here the central questions are “Who knew what?”, “When did they know it?”, and “How did they acquire the information—from which sources and in which contexts?” The breadth of such questions requires, of course, highly generalized responses. Nevertheless, the circle of decision makers in this area is relatively small, and we can at least identify some general patterns in the availability of particular kinds of knowledge.

At the beginning of the process of drafting a competition law (*i.e.*, the mid-1990s) knowledge of competition law among Chinese officials and scholars was very limited. Few had studied foreign laws or experience in any great depth. Even today, only a few scholars have studied foreign competition laws and experiences systematically and in-depth.<sup>29</sup> There are relatively few books and in-depth articles on foreign competition laws and experience available in Chinese. This tends to give heightened influence to those few experts and sources, but it also means that Chinese decision makers acquire much of their knowledge of foreign law and experience through discussions with foreign officials and scholars, who have, of course, their own

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28. *See, e.g.*, Dongsheng Li, Deputy Dir.-Gen., State Admin. for Industry and Commerce (SAIC), Comments at International Competition Law Forum, Beijing: China Needs an Antitrust Law (June 18, 2005), available at [www.saic.gov.cn/hdxw/news.asp?newsid=771](http://www.saic.gov.cn/hdxw/news.asp?newsid=771).

29. This situation is likely to change dramatically over the next five to ten years as significant numbers of Chinese students go to the United States and Europe to study competition law.



interests and agendas. In general, therefore, the knowledge to which these decision makers have had access during the drafting process has often been relatively thin and sometimes selective and potentially misleading. Careful and analytical comparisons of the applicability of U.S. and European competition law to the situation in China have been particularly rare.

The content of that knowledge base includes information primarily about U.S. and European experience, although the Chinese have also paid significant attention to Japanese and Korean experience. Material in English tends to be most easily accessible to Chinese officials, who seldom read foreign languages other than English, and these sources naturally tend to feature U.S. law. This means that with regard to U.S. law, Chinese officials and scholars can acquire and read articles, books, and other materials far more easily, and with significantly lower cost, than materials about other systems written in less accessible languages. Moreover, for reasons mentioned above, the incentives to study it are particularly strong.

Aside from U.S. antitrust law, the most developed national system (excluding the E.U.'s regional system) has been German competition law,<sup>30</sup> but there is apparently relatively limited knowledge of German among Chinese officials. This means that information about German development tends to come primarily from the few Chinese experts that have studied it carefully, from discussions with German officials and scholars, and from the limited materials about German law available in English. While valuable, these forms of information are necessarily more limited and generally more superficial than knowledge about U.S. law. Nevertheless, the most influential Chinese expert in the area, Prof. Wang Xiaoye of the Chinese Academy of Social Sciences (CASS) received a Ph.D. in competition law in Germany and has conveyed much information about German competition law in Chinese. A further hindrance to in-depth study of German law is the fact that since 2004, it has lost much of its autonomy, as it has become part of the "modernized" European competition law system.

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30. *See, e.g.*, DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE 266–333 (1998, pbk ed., 2001).

The type of information available is particularly important in this context. In general, incentives are greatest for Chinese officials to gather information on current substantive law, generally including statutory provisions and sometimes including case law, and information about the current practices of foreign competition authorities. This kind of information appears most directly useful to Chinese officials, and it is also the type of information that is most easily acquired. For many purposes, however, it is not the most useful information, because information about the current law can provide little, if any, assistance in analyzing what might be valuable and appropriate for China and what kinds of factors might influence further developments and consequences in China. For that purpose, it is necessary to carefully and comparatively examine *actual experience* with these norms and institutions. Some officials recognize the importance of such material for making useful comparisons with the situation in China, but this kind of information is more difficult to obtain and evaluate.<sup>31</sup>

## 2. Status of Information

In assessing the influence of information about foreign competition law, it is necessary to examine not only what the knowledge base contains, but the status of the information it contains. This refers to the weight or value attached to it by decision makers. There are, of course, many different pieces of information and many factors that can affect valuations, but we can identify major patterns of influence. Again, the claims here are necessarily broad. The objective is merely to identify factors that enhance or reduce the status of information.

The status of information about U.S. antitrust law is heavily conflicted. Several factors tend to enhance its status among the relevant Chinese decision makers, while others undermine that status. The status-enhancing factors include the general image of the U.S. antitrust system as the “father” (“mother” would be a better term) of

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31. One measure of the presence of such interest is the publication in China of a Chinese translation of my long and detailed study of the development of competition law in Europe. DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE* (1998).

antitrust laws. The U.S. antitrust laws were the first to play a significant role in national legal and economic development, and U.S. experience with antitrust law has been far more extensive than experience with such laws elsewhere. There is a very large number of reported antitrust cases, many of which contain detailed factual material as well as analysis of legal and factual issues. The cases have spanned many years and dealt with an exceptionally wide range of issues and circumstances. Moreover, the academic and practical literature on U.S. antitrust law is far more extensive than such literature elsewhere.<sup>32</sup> This makes U.S. antitrust a particularly valuable source of information and creates incentives for scholars and officials to study it. Some even assume that this extensive experience must have led to a particularly sophisticated and developed antitrust model.<sup>33</sup> Moreover, U.S. antitrust law is associated with U.S. economic successes, especially since the early 1990s, and this tends to enhance its appeal to Chinese leaders, who seek similar economic successes.

Another factor that enhances the status of U.S. antitrust law is its international role. It is the antitrust law system that is best known and most emulated around the world and thus for many it serves as a kind of proxy for a global standard. In addition, many assume that the power and influence of the United States will tend to lead all countries to converge their antitrust systems toward that of the United States. This further increases the potential value to the Chinese of understanding and perhaps emulating that system.

Finally, the U.S. model of competition law is backed by the power and influence of U.S. government officials, law firms, economists and management advisory firms. For example, in international conferences regarding competition law and in international organizations such as the International Competition Network (ICN) and the Organization for Economic Co-Operation and Development

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32. For discussion of the role of U.S. antitrust law in thinking about competition law outside the United States, see GERBER, *COMPARATIVE ANTITRUST LAW*, *supra* note 7.

33. The long experience of the United States has clearly produced a sophisticated competition law, but that does not, of course, render it likely to be useful in the institutional context of China. For discussion of the potential value of U.S. experience for China, see David J. Gerber, *Constructing Competition Law in China: The Potential Value of European and U.S. Experience*, 3 WASH. U. GLOBAL STUD. L. REV. 315 (2004).

(OECD), US officials, lawyers, economists, and scholars often play leading roles. They tend to support strongly the basic U.S. model of competition law and assume it to be appropriate everywhere. This further enhances its status among Chinese decision makers.

On the other hand, there are also factors that reduce the status of that information. One is the reverse of the medallion noted above. U.S. officials' and institutions' use of their status and power to "push" China in a particular direction may be seen as a form of coercion, and there is at least anecdotal evidence that some Chinese leaders and officials are inclined to resist such pressures. More fundamentally, the uniqueness of the U.S. experience with antitrust law tends to weaken claims that the U.S. model of antitrust law would be appropriate for China.<sup>34</sup>

Although information about European competition law appears to be significantly more limited than information about US antitrust law, it has also been influential. The draft Chinese legislation tends to follow generally a "European" model, and in that context the impact of German competition law is particularly strong.<sup>35</sup> In part, this may be due to the traditionally high status of European legal systems, in particular German law, in China. The Chinese legal system features many characteristics that have been derived from German and other European laws, often as transmitted through Japanese law.<sup>36</sup> This tends to support claims that a European-style system would be most appropriate for China, because it would "fit" better into the Chinese legal system.

Finally, Chinese officials and scholars have also had access to significant amounts of information about Japanese and Korean competition law and experience, and that knowledge seems to have been accorded relatively high status. Given that there are many

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34. *Id.* at 319–21.

35. See Wang Xiaoye, *Issues in the Drafting of China's Anti-Monopoly Law*, 3 WASH. U. GLOBAL STUD. L. REV. 285–86 (2004). There are also significant similarities to the European Community competition law. For discussion, see, e.g., Mark Furse, *Competition Law Choice in China*, 30 WORLD COMPETITION L. REV. 323, 334–40 (2007), and Harris, *supra* note 1. German competition law has been particularly important in the development of competition law in Europe, particularly in its early decades. For discussion, see Gerber, *supra* note 17, at 331–61.

36. Volker Behr, *Development of a New Legal System in the People's Republic of China*, 67 LA. L. REV. 1161, 1162–64.

similarities between the Japanese and Chinese legal systems, there is significant interest in Japanese law for reasons similar to those mentioned above regarding German law. As a source of important content taken into Chinese law, Japanese law has been generally influential, and Japan is the East Asian country with the most experience in competition law. The vast differences between Japan and China and the lingering resentment in China regarding Japanese conduct in China during the past century tend, however, to diminish the status of Japanese influence among some Chinese. Korea's experience with competition law is more recent and more limited than is Japanese experience, but some important similarities in the developmental contexts faced by the two systems make Korean experience valuable as well.

### 3. Cognitive Structuring

A third element in assessing cognitive influence refers to the ways in which the information is perceived among the relevant Chinese decision makers. Specifically, this includes the cognitive mechanisms that filter information and then configure it in the thought and discourse of Chinese decision makers. I here identify some of the factors that shape Chinese thinking about competition law issues.

#### a. Chinese Language

One key structuring factor is the Chinese language itself. The concept of "competition" was not part of the policy vocabulary in postwar China until after 1979, and it has acquired status only slowly since then. Until well into the 1990s, it appears to have been used primarily in a pejorative or at least vaguely suspect way. As Xiaoye Wang, one of China's leading competition law experts puts it, competition was regarded as an "evil capitalist monster."<sup>37</sup> The language of "competition law" is even less familiar, and this lack of familiarity leads to uncertainty in processing and evaluating information relating to foreign law experience. For example, the

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37. Xiaoye Wang, Asian Competition Forum, Hong Kong Polytechnic University, Recent Developments in Chinese Legislation on Antitrust Law 2 (Dec. 12, 2005).

distinction between “efficiency” and “effectiveness” often seems to be blurred in discussions of competition law in China, even among the most knowledgeable experts in the area. This is not an inherent deficiency of the Chinese language, but rather reflects limited experience with the concepts and ideas that are part of U.S. and European competition law regimes.

#### b. Political Rhetoric

Political rhetoric also creates incentives and associations that tend to influence perceptions of foreign experience. For more than two decades, China has been pursuing what it calls a “socialist market economy.” This concept is rooted in an ideological framework that generally minimizes the intrinsic value of competition—i.e., competition for its own sake or the market as a form of social ordering. In this view, competition is valued solely for its consequences—specifically, its effectiveness in promoting economic development. For many, “competition” also has negative associations, because prior to 1979 it had long been considered antithetical to the goals of Chinese communism. “Competition” as a value is thus not only burdened with some negative associations, but even its positive valuations tend to be solely instrumental. As a consequence, this rhetorical scheme does not easily value a law that seeks to protect the process of competition other than for purely instrumental reasons. To the extent that this purely instrumental view of the value of competition law predominates, competition has no independent status, and it can thus easily be subordinated to other policy initiatives that may be considered more important for economic development at a particular time.

#### c. Chinese Experience

Chinese experience also shapes, colors, and tones the perception of foreign law and experience. Throughout Chinese history, governments have placed significant controls on economic activity, and the control of economic activity from 1949 until very recently was nearly total. As a consequence, there is little experience with the idea of protecting the process of competition, with the view that market forces should be unrestrained, or with the view that the

market should represent the central force in organizing economic and social life. Moreover, the history of the last century and a half in China has understandably generated strong resistance to foreign influence and control. Given that competition law is a foreign “import” that also is widely suspected of favoring Western economic and political interests, it is inevitably associated with the fears, concerns and issues associated with foreign control. Finally, perhaps the most fundamental factor in Chinese history is the belief that China is unique, “special.”<sup>38</sup> It is not “the West,” although it seeks to emulate important aspects of Western development and to play on a global stage still dominated by Europe and the United States.<sup>39</sup> This inevitably generates skepticism about the role and value of competition law in China.

#### d. Role and Capacity of Institutions

Finally, Chinese conceptions of the roles and capacities of Chinese institutions shape the incentives of those who make decisions about competition law. They play a major role in refracting foreign experience for use in developing competition law in China. These understandings of Chinese institutions also shape expectations regarding the costs and benefits of using particular institutions in particular ways in promoting compliance with the law.

I mention here only two. One relates to the courts. Courts play central roles in U.S. antitrust law and are often also important in Europe. In using foreign experience, however, Chinese officials are aware that certain characteristics of courts in China differ significantly from those in the United States and Europe.<sup>40</sup> For example, the independence of many courts in China remains somewhat dubious, at least in litigation that might be considered politically or economically sensitive, and many competition law

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38. For discussion of China’s “new nationalism”, see PETER HAYS GRIES, CHINA’S NEW NATIONALISM: PRIDE, POLITICS AND DIPLOMACY (2004).

39. *Id.*

40. Mark Williams argues that deficiencies in the Chinese judiciary are a major obstacle to effective development of competition law in China. MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN 412–36 (2005).

cases are one or both.<sup>41</sup> The government has undertaken steps to increase the independence of courts, and this has led to significant improvement in the area, especially in big cities like Shanghai and Beijing.<sup>42</sup> Nevertheless, suspicions about the independence of the judiciary may have contributed to the lack of a significant role for them in the proposed competition law regime. An additional factor in assessing the potential role of the judiciary in a competition law system in China is that judges have rather limited training and capacity in the area of economic law, thus giving further incentives not to imbue them with authority in applying and enforcing competition law.

Another perception of Chinese institutional capacity that plays a role in thinking about competition law relates to administrative decision making. The Chinese bureaucratic tradition is long and often distinguished. Its high status in contemporary China continues to give it authority and to provide incentives for entry into the bureaucracy. Many of the best and brightest in China are drawn to the central administration. Nevertheless, political factors may play major roles in their decision making and create incentives for bureaucrats to control economic processes rather than allow markets to evolve according to their own dynamics. This can create important issues concerning the ways in which decision making in the competition law area should be structured.

These kinds of perceptions of the capacity of institutions in China to perform specific tasks in particular ways shape conceptions of how competition law can and should function—who should do what. They determine the kinds of issues that are likely to be entrusted to specific institutions as well as the levels of discretion they are likely to enjoy. This, in turn, shapes thought about the possibilities and limits of competition law in the Chinese context.

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41. For discussion of developments in this area, see, e.g., Stephanie Balme, *The Judicialisation of Politics and the Politicisation of the Judiciary in China (1978–2005)*, 5 GLOBAL JURIST FRONTIERS 1 (2005), <http://www.bepress.com/gj/frontiers/vol5/iss1/art1>.

42. For discussion on this topic, see, e.g., Mei Ying Gechlik, *Judicial Reform in China, Lessons From Shanghai*, 19 COLUM. J. ASIAN L. 97 (2005); Judge Jianli Song, *China's Judiciary: Current Issues*, 59 ME. L. REV. 141 (2007).



*B. Foreign Institutional Pressure*

Institutional pressure may also influence decisions regarding the content of competition law. In the Chinese context, however, the pressure is harder to define and often more subtle, because foreign institutions have relatively few direct tools for exerting such pressure. As distinct from cognitive influence—i.e., the influence of information, concepts and narratives on what decision makers know—the objective is to identify processes by which foreign institutions make requests on Chinese officials and explicitly or implicitly attach consequences to China's responses to those demands. Given that there is often little or no access to information about the contents of discussions and meetings, it is difficult to ascertain the extent to which foreign institutions seek to apply such pressure directly. We can, however, identify indirect forms of pressure. In these cases, the foreign institution indicates its desired outcomes and indicates or implies that it is able to attach negative or positive consequences to China's responses to its requests. Where an institution's power to achieve such consequences is obvious and can be used with little cost to it, the potential to use that power may obviate the need for explicit reference to it.

International organizations have sought to influence the general conception of Chinese competition law legislation as well as particular provisions of the law. For example, the WTO has referred to the importance of protecting against discriminatory use of competition law in both the Chinese accession agreement and in follow-up reports.<sup>43</sup> Additionally, the OECD has sponsored and co-sponsored several conferences on Chinese competition law in Beijing, including one in July 2007.<sup>44</sup> In general, OECD discussions favor a "U.S.-style" competition law. Other relevant institutions such as the United Nations Commission on Trade and Development (UNCTAD) have been less certain that this model is appropriate for

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43. For references and further discussion, see Furse, *supra* note 35, at 332–35.

44. According to Xiaoye Wang, "OECD in particular contributed greatly to the international symposiums organized jointly with the Chinese drafting group on Anti-Monopoly Law between 1997 and 1999, in which the draft law was discussed article by article." Wang, *supra* note 35, at 285.

China.<sup>45</sup> International institutions by themselves do not, however, have strong pressure levers within China. In contrast to many other countries that have needed loans and other forms of financial support from international organizations, the Chinese government has not needed loans or economic aid from international organizations, and thus the pressure they can exert is limited.

Foreign governments have also exerted pressure regarding the shaping of the statute, particularly over the last several years. Again, this pressure is often indirect and difficult to identify clearly. U.S. antitrust enforcement officials have been particularly prominent in this context. Leading officials have made numerous trips to Beijing in which these issues have been discussed, and they have hosted relevant Chinese officials and scholars in the United States. They have generally sought to convince the Chinese to take an approach that is more in line with U.S. antitrust law and to move away from early drafts of the statute.<sup>46</sup> In particular, they have urged that the law focus on horizontal conduct and minimize (or even eliminate) provisions relating to unilateral conduct and eliminate or weaken merger provisions.<sup>47</sup> Foreign commentators have frequently expressed a concern that such provisions could be used to protect Chinese firms from foreign competition.<sup>48</sup> In these circumstances, factors such as the status of U.S. institutions, the importance of US investment in China, and the roles of U.S. actors in important international contexts create substantial, and often indirect, pressure on Chinese decision makers to follow U.S. suggestions.

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45. See, UNITED NATIONS PUBLICATIONS, MODEL LAW ON COMPETITION: SUBSTANTIVE POSSIBLE ELEMENTS FOR A COMPETITION LAW, COMMENTARIES AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATIONS (Jan. 5, 2007).

46. For an example of U.S. government positions in these talks, see William Blumenthal, Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China (May 23–24, 2005), <http://www.ftc.gov/speeches/blumenthal/20050523SCLAOFinal.pdf>.

47. *Id.*

48. See, e.g., Rebecca Buchman, *China Hurries Antitrust Law*, WALL ST. J., June 11, 2004, at A7.

### *C. Domestic Incentives*

Powerful domestic interests attach to several key issues in the statute. These include, for example, substantive issues such as how to interpret the merger provisions in the legislation and institutional issues such as which institution or institutions within the bureaucracy should have responsibility for enforcing the competition law. As to these issues, there have apparently been serious controversies and discussions for years. With regard to most issues regarding the structure and style of the provisions, the specific language of particular norms, and the types of procedures to be employed, there are limited incentives for domestic institutions to seek influence. Here the lack of experience in competition law among the decision makers tends to blunt interest. The most fundamental issue, however, is whether the competition legislation will be enforced, and here groups such as SOEs have strong incentives to resist energetic enforcement of the law.

## IV. IMPLICATIONS FOR COMPETITION LAW IN CHINA

The two sets of factors that we have identified as impelling and shaping the Chinese competition legislation are likely also to influence decisions about its implementation. The absolute and relative weight of these influences will undoubtedly vary in the enforcement context. The incentives for SOEs to seek to influence enforcement decisions may, for example, increase in the context of implementation and thereby influence administrators making decisions in the area. In the first two stages of development of the law, uncertainties as to whether a competition law would actually be enacted as well as about its content may have reduced the force of those incentives. When the legislation is in place and can be implemented, however, the incentives will become correspondingly more immediate and pressing. As long as the law is not actually being implemented, the present value of avoiding potential future compliance costs is likely to be heavily discounted, but the rate of discounting alters when the statute is actually being implemented. Moreover, new and unanticipated factors may also be added to the mixture of interacting influences. For example, enforcement officials

may face incentives to follow particular practices that are considered “best practices” by a group such as the International Competition Network (ICN). Nevertheless, the same officials will be subject to many of the same decisional influences as those they have faced in the first two stages of legal development. Identifying these factors enables us, therefore, at least to hazard some general comments about what can be expected to happen now that the statute has been enacted.

One is that predictions about what is likely to happen are necessarily precarious. As we have seen, the decisional influences on competition law officials can swirl in many directions. They have been generally aligned with regard to the decision to enact a competition statute, but as to the law’s contents, these influences have often diverged and conflicted. These conflicts are likely to be even more pronounced where enforcement decisions are at issue. Administrative officials have incentives to make the law effective, but other political, ideological, and economic forces create incentives that might interfere with that goal. This lack of alignment of forces renders predictions exceptionally difficult.

A second conclusion relates to the general disparity noted above between the alignment of interests regarding enactment of the law and those involving implementation of the law. Much of the support for enacting a competition law has involved China’s external relations. In part at least, it has been about signaling to the rest of the world China’s plans and intentions. In contrast, the potential impact of such a law on domestic institutions such as SOEs has played a key role in actually shaping the law. This reflects two distinct perspectives on China’s competition law project, one responding to international concerns and another that focuses on the more immediate and direct interests of Chinese officials and institutions. This may foreshadow significant divergence between the law as written and the law in actual practice. At a deeper level, it may suggest a situation in which the statute itself looks “Western,” but the underlying modalities of implementation remain distinctly Chinese. The incentives to make the statute look like Western models are likely to be stronger than the incentives to apply, interpret, and enforce it in line with those models. This dichotomy between form and actual operation may also be attractive to Chinese officials

because it provides a way of reducing conflicts and aligning interests among various elements of the bureaucracy.

A third comment relates to the role of Chinese history and culture in shaping implementation. Here two images are likely to be particularly important. One is the perception of Chinese uniqueness mentioned above. This perception frames foreign views of competition law and Western experience as “alien” to Chinese reality and Chinese interests, and it may thus obviate the need to apply and interpret Chinese competition law along Western lines. This could, in turn, mean that decisions to enforce competition law against Chinese firms will be viewed differently from similar decisions regarding non-Chinese firms. This “uniqueness” also refers at another level to the intimate relationship between Chinese firms and the political institutions that either own or significantly control them. This relationship also helps to justify decisions to apply the law differently as between the two groups. As Chinese firms become global players themselves, the force of this justification may diminish.

Finally, where decisional incentives and interests diverge and conflict and where they are attached to individuals and groups with significant political power, the implementation process is likely to be slow and cautious. The need to minimize disruptions in the economy as well as conflicts within the bureaucracy create strong incentives for officials to delay significant enforcement of the statute’s provisions. Moreover, in the post-enactment phase there is no immediate need to take enforcement action. To the extent that the enactment of the statute is intended to be a message to the outside world, enactment itself is the key factor. Whether and to what extent the legislation is enforced is less important for, perhaps, a relatively long period of time. Chinese officials also recognize their need for further knowledge about the likely consequences of their decisions. As discussed above, they have only in the last few years begun to develop an understanding of competition law systems, and thus they have strong incentives to proceed slowly and with caution in developing their procedures, practices, and operating norms. Most

competition law systems have followed the same path of caution, and some Chinese administrators are also aware of that fact.<sup>49</sup>

#### V. CONCLUDING COMMENTS

This brief Article has offered tools for analyzing legislative and enforcement decisions that are taken in the global arena and relate to global economic processes. Specifically, it provides a method for developing insights into the ways in which national and transnational influences interact in considering and making such decisions. This set of tools draws on forms of cognitive and institutional analysis that have not, to my knowledge at least, been systematically explored, but that hold great promise for analyzing legal development.

Applying this analytical framework to the development of competition law in China has demonstrated some of its potential value. It has provided a means of identifying incentives facing Chinese decision makers and relating these decisional influences to each other. This allows us to gain insight into the decisional field that Chinese officials have faced in moving toward and shaping a Chinese competition law, and it also provides a means of identifying the influences that are likely to shape the decisions of Chinese enforcement officials in the future.

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49. For similar strategies in the development of, respectively, German and European Community competition law, see GERBER, *supra* note 17, at 276–306, 348–58.